(3) (3)

SEP 2 0 2004

Nos. 04-228 & 04-229

IN THE

Supreme Court of the United States

FIRST NATIONAL BANK OF MILACA,

Petitioner,

-and-

COUNTY OF MILLE LACS,

Petitioner,

v.

MELANIE BENJAMIN, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

MARC D. SLONIM
Counsel of Record
JOHN B. ARUM
ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 Fourth Avenue
Suite 1230
Seattle, WA 98121
(206) 448-1230

Attorneys for Respondents

189845

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	2
Reasons for Denying the Petitions	10
A. The Lower Courts' Decisions In This Case Do Not Conflict with Any Decision of This Court or Any Other Court.	11
B. Federal Courts Have Had No Difficulty in Applying Article III Standing Requirements in Reservation Disestablishment Cases. ...	17
C. The Lower Courts Did Not Err in Determining Petitioners Failed to Present Specific Evidence of Injury in Response to Respondents' Summary Judgment Motion.	19
1. Enforcement of State and Local Laws. ..	19
2. Enforcement of Band Laws.	20
3. Property Values.	21
4. Controversy	22
Conclusion	23

TABLE OF CITED AUTHORITIES

Page

Cases:

Association of Property Owners/Residents of Port Madison v. Individual Council Members of the Suquamish Tribal Council, 79 Fed. Appx. 126, 2003 WL 22098043 (9th Cir. 2003) 18

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) 3

Babbitt v. United Farm Workers, 442 U.S. 289 (1979) 12

Baker Elec. Co. v. Chaske, 28 F.3d 1466 (8th Cir. 1994) 15

Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209 (1993) 21

Brown-Outagamie-Oneida Jurisdiction Commission v. Powless, No. 85-C-1052 (E.D. Wis. 1990) ... 18

Cass County v. United States, 570 F.2d 737 (8th Cir. 1978) 14, 18

City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972) 13, 14, 17

Clinton v. City of New York, 524 U.S. 417 (1998) ... 12

DeCoteau v. District Court, 420 U.S. 425 (1975) .. 17

Cited Authorities

	Page
Diamond v. Charles, 476 U.S. 54 (1986)	23
Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000)	11
Hagen v. Utah, 510 U.S. 399 (1994)	17
Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972)	12
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	11, 23
Mattz v. Arnett, 412 U.S. 481 (1973)	17
Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996)	16
Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994 (8th Cir. 1993)	16, 17
Minnesota v. Mille Lacs Band, 526 U.S. 172 (1999)	6
Montana v. United States, 450 U.S. 544 (1981)	3
Nevada v. Hicks, 533 U.S. 353 (2001)	3, 23
Northern States Power v. Prairie Island Mdewakaton Sioux Indian Community, 781 F. Supp. 612 (D. Minn. 1991), *aff'd*, 991 F.2d 458 (8th Cir. 1993)	15

Cited Authorities

Page

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 2

Oneida Indian Nation v. City of Sherrill, 337 F.3d 139 (2nd Cir. 2003), *cert. granted*, 124 S. Ct. 2904 (2004) 13

Pennell v. San Jose, 485 U.S. 1 (1988) 12

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 14

Raines v. Byrd, 521 U.S. 811 (1997) 12

Rosebud Sioux Tribe v. Kneip, 375 F. Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977) 12-13, 17

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) ... 12

Seymour v. Superintendent, 368 U.S. 351 (1962) .. 18

Solem v. Bartlett, 465 U.S. 463 (1984) 17

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 13, 17

Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okl., 725 F.2d 572 (10th Cir. 1984) 16

Cited Authorities

	Page
Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001)	12
Thomas v. Union Carbide, 473 U.S. 568 (1985)	12
United States v. Grey Bear, 828 F.2d 1286 (8th Cir.), *vacated in other respects*, 836 F.2d 1088 (8th Cir. 1987)	18
United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980)	18
United States v. Webb, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001)	18
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	11
Virginia v. Hicks, 539 U.S. 113 (2003)	19
Weisgram v. Marley, 528 U.S. 440 (2000)	21
White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982)	18

Cited Authorities

Page

Wisconsin v. Baker, 464 F. Supp. 1377, *aff'd*, 698 F.2d 1323 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983) 15, 16

Statutes:

2 MLBSA § 3001(a) 2

2 MLBSA § 3003 2

5 MLBSA § 101 2

5 MLBSA § 111(b) 2

5 MLBSA § 113 2

11 MLBSA § 1002 2

18 MLBSA § 101 ..... 2, 4, 6

24 MLBSA § 1 2

24 MLBSA § 3301 2

24 MLBSA § 3309 2

Rules:

Federal Rule of Civil Procedure 24(a) 16

Federal Rule of Civil Procedure 56(e) 21

Petitioners County of Mille Lacs ("County") and First National Bank of Milaca ("Bank") sued respondents, five officials of the Mille Lacs Band of Ojibwe Indians ("Band"), for a declaration that the Mille Lacs Indian Reservation has been disestablished. After discovery, respondents moved for summary judgment on jurisdictional grounds. The district court, in a detailed opinion, held petitioners lacked standing and the case was not ripe. Bank App. 9a-27a (Rosenbaum, C.J.). On *de novo* review, a unanimous Eighth Circuit panel held "the district court correctly concluded [petitioners] lacked standing" and ordered the case dismissed without prejudice. *Id.* 4a, 5a, 7a (Riley, Bowman, and Smith, JJ).

In reaching these conclusions, the district court and court of appeals applied well-settled principles governing Article III standing. *Petitioners do not challenge (or even discuss) these principles*. Instead, they point to cases in which courts have resolved reservation disestablishment claims on the merits. However, the fact that courts have resolved such claims in other cases does not demonstrate petitioners had standing in this case. Federal courts have had no difficulty in applying the standing requirement in reservation disestablishment cases, and the lower courts' determination that petitioners lacked standing in this case conflicts with no decision of this or any other court. Because the consistent, straightforward application of settled principles of standing in reservation disestablishment cases does not present an important federal question requiring this Court's intervention, the dismissal of this case without prejudice does not warrant *certiorari*.

STATEMENT OF THE CASE

1.

In the early 1980s, the Mille Lacs Band formed a separation-of-powers government, and began adopting written statutes regulating its affairs. *See* Resp. 8th Cir. App. 170. Most of these statutes were adopted in the mid-1980s, nearly 20 years ago, and were re-codified and published in 1995. *Id.* 168, 170, 213-14.

The Band's statutes do not assert jurisdiction over all persons within the boundaries of the Mille Lacs Indian Reservation, as established in 1855. Rather, they typically apply to persons and on lands or territories "under the jurisdiction" of the Band. *See, e.g.*, 2 MLBSA §§ 3001(a), 3003 (exclusion ordinance) (Bank 8th Cir. App. 93-94); 5 MLBSA §§ 101, 111(b), 113 (Band court jurisdiction) (Bank 8th Cir. App. 107-12); 11 MLBSA § 1002 (solid waste regulation) (Bank 8th Cir. App. 242); 18 MLBSA § 101 (business licensing) (Bank 8th Cir. App. 67); 24 MLBSA § 1 (civil causes of action) (Bank 8th Cir. App. 117); 24 MLBSA §§ 3301, 3309 (creditor remedies) (Bank 8th Cir. App. 181-84). This approach is common in Indian country, where the personal and territorial scope of tribal jurisdiction can vary depending on who (tribal members, nonmember Indians, or other nonmembers) is being regulated and the purpose of the regulation, and can vary over time depending on judicial decisions, the acquisition of trust lands, and other factors.

In 1978, this Court held tribes lack criminal jurisdiction over nonmembers. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Since then, the Court has held tribes generally lack *civil* jurisdiction over nonmembers as well:

"Where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Nevada v. Hicks*, 533 U.S. 353, 359 (2001), quoting *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added by the *Hicks* Court).

Thus, when it comes to nonmembers, a tribe's "territorial jurisdiction" is not co-extensive with its reservation boundaries. For example, in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the Court held a tribe could not tax a nonmember doing business on non-Indian fee land within a reservation. The Court stated an "Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than *tribal* land." *Id.* at 653 (emphasis added). Indeed, the *Hicks* Court observed that "[h]itherto, the absence of tribal [land] ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." 533 U.S. at 360.

For these reasons, the Band's statutes cannot fairly be read as asserting jurisdiction over nonmembers throughout the 1855 Reservation. The Band's current Chief Executive, Melanie Benjamin, interprets references in the Band's statutes to the "territorial jurisdiction" of the Band and to "property subject to the jurisdiction of the Band" as references to *Band-owned* lands. Resp. 8th Cir. App. 181c-d. In light of this Court's decisions, Ms. Benjamin believes the Band's statutes "pertain to the members of the Mille Lacs Band Reservation. The enrolled members. And how we govern ourselves. So, with that, the answer [is] that those laws are directed towards the members of the Mille Lacs Band." *Id.* 179.

2.

Although they have been on the books for nearly 20 years, the Band has *never* applied or threatened to apply its laws to the County or the Bank. The Band only applies its laws to nonmembers who choose to do business with the Band on Band lands. This assertion of jurisdiction does *not* rest on the status of the 1855 Reservation.

For example, within the Band's separation-of-powers government, its Corporate Commission has "the sole power and authority to license commercial entities who sell or offer for sale any goods and/or services to person(s) on lands subject to the jurisdiction of the [Band]." 18 MLBSA § 101 (Bank 8th Cir. App. 67). A person or entity who desires to sell goods or services to the Band, a Band member or "any person subject to the jurisdiction of the [Band] . . . shall . . . be permitted to do so under such rules and regulations as the Corporate Commission may prescribe." *Id.*

Under these provisions, the Band's Corporate Commission developed a business-licensing program in the early 1990s, coincident with the development of the Band's casino gaming enterprises. Resp. 8th Cir. App. 127 (¶ 4). The licensing program was designed to collect background information on persons doing business with the Band, to enable the Band to protect the reputation and viability of its casinos. *Id.* The Commission's requirement that businesses obtain a Band license was *not* based on a business's location within the 1855 reservation; the requirement was applied only to businesses that chose to provide goods or services to the Band on Band lands. *Id.* (¶¶ 3-4).

The Bank focuses on, but mischaracterizes, two letters regarding the Band's licensing program. Bank Pet. at 9. In a March 23, 1992, letter, the Band's Corporate Administrator wrote that the Corporate Commission was "in the process of licensing all organizations doing business upon *tribal* lands." Bank App. 60a (emphasis added). The letter quotes the preamble to the Band's licensing statute, in which the Band's legislative body found that licensing persons and entities "who engage in the sale of any goods and/or services with *any constituent band* of the Non-Removable Mille Lacs Band of Ojibwe Indians is an effective way to regulate commercial activity on lands under the jurisdiction of the band." *Id.* (emphasis added). The letter was sent only to those persons and entities that had business dealings with the Band, Resp. 8th Cir. App. 127 (¶ 3), and, as the Bank admitted, was not sent to the Bank. *Id.* 124 (¶ b).

In a 2001 letter, the Corporate Commission's current Business Regulation Officer, Molly Big Bear, wrote that it is the Band's goal "to establish an effective system of regulation concerning business transactions within the boundaries of tribal territories." Bank App. 62a. The letter states the Commission is "in the process of updating all licenses of organizations doing business upon *tribal lands*," and encloses a "Temporary Vendor License application *to do business with the Mille Lacs Band* of Chippewa Indians." *Id.* 62a-63a (emphasis added). Like the 1992 letter, Ms. Big Bear's letter was "sent *only* to those business entities – whether located on or off [the] Reservation – that have expressed an intent to do business with the Band." Resp. 8th Cir. App. 32 (¶ 5). The Bank admitted it did not receive this letter either. *Id.* 124(¶ b).

Ms. Big Bear testified in a deposition that her understanding of the phrase "within the boundaries of tribal territories" refers to the "1855 boundaries," and that, under 18 MLBSA § 101 the Band's Corporate Commission "has the *power* to license anyone who wishes to provide goods or services to any member of the Mille Lacs Band." Resp. 8th Cir. App. 185, 190 (emphasis added). Ms. Big Bear also testified, however, that the Corporate Commission has never exercised this alleged power, but instead has sought only to license those businesses that are doing business with the Band. *Id.* 32-33 (¶¶ 4-9), 186, 188, 191-95. There is no evidence the Band has *ever* sent a license application to a business that was not seeking to do business with the Band, that is has *ever* told such a business that it was required to obtain a license from the Band, or that it has *ever* taken *any* action against such a business because it did not obtain a license from the Band.

3.

Soon after this Court affirmed the Band's treaty hunting, fishing and gathering rights in *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999), the Band's opponents began claiming the Band was threatening to regulate non-Indians on non-Indian lands within the 1855 Reservation. In January 2000, then-Mille Lacs County Attorney Janelle Kendall found "widespread *misinformation*" about the Band's ability to tax, prosecute and zone non-Indians was creating civic unrest and a public safety risk. Resp. 8th Cir. App. 69, 73 (emphasis added). Concerned that County residents were being "intimidated or pressured . . . to participate in political activity currently underway regarding these issues," Ms. Kendall undertook to advise the County Board "regarding the general legal ability of the Mille Lacs Band to affect the daily living situation of non-Indian County residents." *Id.* 69.

Ms. Kendall found the Band had *not* sought to tax or regulate any businesses other than those that chose to do business with the Band. *Id.* at 70. Further, she stated that, other than regulation of underground injection wells, she was "unaware of the Mille Lacs Band ever attempting to exercise any other civil or regulatory jurisdiction, including attempted taxation, regarding *any non-Indian* in Mille Lacs County." *Id.* at 70-71 (emphasis in original).[1] Based on her analysis of the Band's legal authority, Ms. Kendall concluded that, even if the Reservation continued to exist, the Band could not tax, zone or prosecute non-Indians within its boundaries. *Id.* 71-72.

Ms. Kendall's memorandum notwithstanding, the County retained outside counsel and filed suit against five Band officials in 2002, seeking a declaration that the original boundaries of the Mille Lacs Reservation have been disestablished. County 8th Cir. App. 44. The Bank intervened seeking the same relief. Resp. 8th Cir. App. 24. Neither disputed the "reservation" or "Indian country" status of trust lands within the original Reservation boundaries. Bank App. 11a.[2]

---

1. Although the Environmental Protection Agency ("EPA") had approved the Band's application to develop a program regulating underground injection wells on the Reservation, the Band never adopted the program. Instead, it negotiated with EPA and the Minnesota Pollution Control Agency ("MPCA") for continued *Federal* regulation of such wells, with technical assistance from the Band and MPCA. Resp. 8th Cir. App. 151 (¶ 25). The Band has applied for "treatment-as-a-state" status under other environmental programs so that it can receive research and development funding from EPA, but has not sought to implement any other regulatory program. *Id.* 198-201.

2. *After* this lawsuit was filed, local real estate agents began disclosing that *the County* had filed a lawsuit "in a dispute over the boundaries" of the Reservation, while noting that the "Band has stated publicly that [it] *would not* have jurisdiction or taxing power over non-band members who own property in the disputed area." County App. 206a (emphasis in original).

After completion of initial discovery, respondents moved for summary judgment on standing, ripeness, sovereign immunity and indispensable party grounds. The district court dismissed the case, finding petitioners lacked standing and the case was not ripe. Petitioners' primary claim of injury arose out of threatened regulation by Band ordinances. Bank App. 16a. The court found this claimed injury was not "actual, concrete, or imminent," since the Band had "neither threatened nor demonstrated an intent to enforce its ordinances beyond its 4000 acres [of trust lands]." *Id.* 16a-17a. Nor did the text of the Band ordinances cited by petitioners establish threatened or pending enforcement, since they contained only one reference to the 1855 Reservation and asserted jurisdiction only to the extent authorized by Federal law. *Id.* 18a & n.8.

The court likewise rejected the County's claim that its ability to protect public safety had been harmed. The County Sheriff's deposition testimony indicated the Band had taken no actions that adversely affected the County's ability to enforce state or county law, and the Band and its members had consistently complied with County zoning regulations and state traffic laws. *Id.* 19a. The court rejected the proposition that Band compliance "under protest" injured the County, as no legal precept supported the theory that "*compliance* with County law constitutes injury." *Id.* 20a (emphasis in original).

The County also alleged injury on the grounds that it might be subject to liability in a future lawsuit challenging its enforcement of civil regulatory laws against Band members on the Reservation. Because no such lawsuit has been filed (or threatened), the court found this "amorphous threat of future liability" insufficient to establish injury in fact. *Id.* 20a-21a.

Finally, the court rejected petitioners' arguments that the reservation boundary dispute had adversely affected the value of the real property interests within the reservation and that such an effect could fairly be attributed to the challenged conduct of respondents. *Id.* 21a-22a.

A unanimous panel of the Eighth Circuit Court of Appeals affirmed. Bank App. 2a. The court reviewed the district court's decision *de novo*, *id.* 4a, and found it had "correctly concluded that [petitioners] lacked standing." *Id.* 5a. The Bank's concerns regarding potential Band regulation did not establish injury in fact but at best "reflect speculative harms based upon the assumed future intent of the Band." *Id.* 6a. For its part, the County was "unable to point to any definite controversy that exists from the Band's purported expansion of tribal jurisdiction over the disputed portion of the reservation," and "presented no evidence that its ability to enforce state or local law on the reservation has been usurped or even affected by the Band's alleged intentions." *Id.*

The court reversed the district court in one respect: it held that the dismissal of the case should be without prejudice. *Id.* 6a-7a. The court subsequently denied petitions for panel and *en banc* rehearing. *Id.* 28a.

REASONS FOR DENYING THE PETITIONS

Petitioners do not challenge (and do not even discuss) the principles of standing applied by the district court and the court of appeals in this case. The sole issue presented is whether the lower courts properly applied these correctly stated legal principles to the particular facts of the case. This factually intensive issue does not warrant *certiorari* for three reasons.

First, petitioners fail to show that the lower courts' application of Article III's standing requirement in this case conflicts with any decision of this or any other court. Petitioners' observation that reservation disestablishment claims have been decided on the merits in other cases does not demonstrate any such conflict, since the resolution of a particular issue in one case does not demonstrate the issue is justiciable in another case.

Second, petitioners fail to show that the federal courts have had any difficulty applying Article III's standing requirement in reservation disestablishment cases. The lower federal courts' consistent application of the standing requirement in such cases does not present an important federal question warranting this Court's review.

Third, petitioners' claim that the lower courts misapplied the standing requirement in this case lacks merit. The lower courts' determination that petitioners failed, in response to respondents' summary judgment motion, to produce specific evidence of injury, is supported by the record and provides no basis for *certiorari*.

A. The Lower Courts' Decisions In This Case Do Not Conflict with Any Decision of This Court or Any Other Court.

Article III limits the "judicial power" of the United States to the resolution of "cases" and "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). The core component of standing is "an essential and unchanging part" of the case-or-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a party must establish:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167, 180-81 (2000); *Lujan*, 504 U.S. at 560-61.

The elements of standing are "an indispensable part of the plaintiff's case," and "must be supported in the same way as any other matter on which the plaintiff has the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. In responding to a summary judgment motion, a plaintiff must set forth by affidavit or other evidence "specific facts" that demonstrate its standing. *Id.*

The mere existence of a statute that might someday be applied to a plaintiff is insufficient to confer standing. *E.g. Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972) ("justiciable controversy does not exist where 'compliance with [challenged] statutes is uncoerced by risk of their enforcement'"); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*) (neither mere existence of statute nor generalized threat of prosecution creates Article III case or controversy), *cert. denied*, 531 U.S. 1143 (2001). Instead, a plaintiff must present "specific facts" showing a "realistic danger" that defendants will enforce their laws in a way that "directly injur[es]" the plaintiff. *Pennell v. San Jose*, 485 U.S. 1, 8 (1988); *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979).

Petitioners do not challenge, or even discuss, these principles. Instead, they argue the dismissal of this case conflicts with other cases in which reservation disestablishment claims were decided on the merits. However, the fact that a particular issue is justiciable in one case does not mean it is justiciable in every case in which it is raised. For example, the constitutionality of the Line Item Veto Act was justiciable in *Clinton v. City of New York*, 524 U.S. 417, 436 (1998), but not in *Raines v. Byrd*, 521 U.S. 811, 830 (1997), where plaintiffs did not establish a sufficiently concrete injury to demonstrate standing. Similarly, a challenge to a federal arbitration scheme was justiciable in *Thomas v. Union Carbide*, 473 U.S. 568, 579-81 (1985), but not in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1019-20 (1984), where the plaintiff did not allege it had been compelled to resort to arbitration.

The principal case on which petitioners rely here, *Rosebud Sioux Tribe v. Kneip*, 375 F. Supp. 1065 (D.S.D.

1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977), does not conflict at all with the decisions in this case. In that case a tribe sued to establish the continued existence of its reservation. The tribe alleged specific, concrete injury because state and county officials were "*exercising* both civil and criminal jurisdiction over [tribal] members." 375 F. Supp. at 1066 (emphasis added). As the district court explained in this case, *Rosebud* "involved explicit efforts by one sovereign to exercise particular powers beyond [its] lawful jurisdiction; [it] did not present abstracted concerns over reservation boundaries." Bank App. 25a-26a.

Similarly, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 340-41 (1998), a tribe brought suit after a state agency issued a permit for a landfill within the historic boundaries of its reservation. The Bank (Pet. at 18) notes that the tribe did not pursue its request for an *injunction* on appeal, but this does not detract from the fact that specific state action – the issuance of the permit – had injured the tribe and gave it standing to sue.[3]

The only other reservation disestablishment case petitioners cite is *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972). In that case a city alleged three specific injuries from a purported expansion of federal and tribal jurisdiction over a disputed portion of a reservation: (1) loss of jurisdiction over Indians within city limits; (2) loss of "revenue derived from licensing the sale of alcoholic beverages"; and (3) impairment of contractual

3. The Bank also cites *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2nd Cir. 2003), *cert. granted*, 124 S. Ct. 2904 (2004). In that case, a tribe sued after a city imposed property taxes on tribal properties, purchased the properties at tax sales, recorded deeds, and started formal eviction proceedings. 337 F.3d at 144.

obligations relating to bonds and warrants backed by property tax revenues. County 8th Cir. App. 135-36. The record does not indicate that defendants disputed these allegations, and the court did not address standing or justiciability. In *Cass County v. United States*, 570 F.2d 737, 741 n.4 (8th Cir. 1978), the Eighth Circuit held *New Town* did not support an argument that a case or controversy existed because "[j]usticiability was never considered as an issue."

New Town provides no basis for a grant of *certiorari* in this case. First, because *New Town* was an Eighth Circuit case, it does not present a conflict between the circuits.[4] Second, because the plaintiff made specific, *undisputed* allegations of injury, the *New Town* court did not reach the issue presented in this case: whether petitioners substantiated their claims of injury when those claims were challenged in respondents' motion for summary judgment. Since the *New Town* court did not address this issue, there is no conflict. Third, because *New Town* does not discuss Article III standing, it does not set an affirmative precedent that standing exists in similar cases. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984).

Petitioners cite several other cases in which courts adjudicated challenges to particular tribal laws. The principal cases on which they rely are also Eighth Circuit cases, and thus do not establish the existence of a conflict between circuits. Moreover, because the plaintiff established specific injury from the particular tribal law being challenged in each case, there is no conflict with the holding in this case.

---

4. In denying panel and *en banc* rehearing in this case, the Eighth Circuit necessarily determined that *New Town* did not present an *intra-circuit* conflict warranting further consideration.

In *Baker Elec. Co. v. Chaske*, 28 F.3d 1466, 1469 (8th Cir. 1994), a tribe contracted with a power producer to serve tribal facilities. When a state court upheld a competing producer's right to serve the facilities, the tribe enacted a utilities code to perpetuate its exclusive relationship with its preferred producer. *Id.* at 1470. The tribe enacted the code as part of a specific, longstanding effort to regulate the provision of electricity services to the competing producer's financial detriment. *Id.* at 1469-70. Thus, the competing producer was already suffering economic injury from the tribe's actions, and the tribe did not dispute its standing to challenge the code.

In *Northern States Power v. Prairie Island Mdewakaton Sioux Indian Community*, 781 F. Supp. 612, 613 (D. Minn. 1991), *aff'd*, 991 F.2d 458 (8th Cir. 1993), a tribe enacted an ordinance restricting plaintiff's nuclear waste shipments. After plaintiff challenged the ordinance administratively, the tribe formally resolved to enforce it. *Id.* at 614. The plaintiff delayed shipments of water samples because of the ordinance, risking fines and other adverse consequences. *Id.* at 616. The district court issued an injunction, finding plaintiff would be *irreparably harmed* if the ordinance remained in effect. *Id.* at 616-17. Because plaintiff showed irreparable harm, there was no question it had standing.

The two non-Eighth Circuit cases on which petitioners rely also do not conflict with the lower courts' decisions in this case. In *Wisconsin v. Baker*, 464 F. Supp. 1377, *aff'd*, 698 F.2d 1323 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983), a state challenged the application of a tribal hunting and fishing code to nonmembers. To establish its standing, the state alleged, and the defendant tribal officials did not dispute, that "upon defendants' direction, agents of the defendants

are *enforcing* the tribal conservation code, causing real and substantial injury to the plaintiff and those for whom it serves as trustee." 464 F. Supp. at 1380 (emphasis added). Similarly, in *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okl.*, 725 F.2d 572, 574 (10th Cir. 1984), an oil and gas lessee challenged tribal ordinances purporting to regulate oil and gas leases. The lessee sued after the tribe *commenced enforcement proceedings* to cancel its lease under the ordinances. *Id.* No similar proceedings have been commenced – or threatened – in this case.

Finally, petitioners cite the Eighth Circuit's decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), a case in which the Band had filed to suit to enable its members to exercise usufructuary rights on ceded lands. The Eighth Circuit permitted counties and landowners to intervene under Federal Rule of Civil Procedure 24(a) because their interests "might be impaired by the disposition" of the case. *Id.* at 997. The court reasoned that the litigation would determine the rights of Band members to hunt, fish and gather on the ceded lands, "including land the counties and landowners own," and *might* reduce the proposed intervenors' property values. *Id.* at 998. As the Eighth Circuit later observed, the court did not address Article III standing. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1299 & n.6 (8th Cir. 1996).

This case is different. Respondents are not suing for a declaration that the 1855 Reservation still exists, or that the Band has any rights or jurisdiction on petitioners' lands. Under Article III, the issue is not whether petitioners' interests "might be impaired" by the disposition of their own lawsuit, but whether the challenged actions of the defendants have caused an actual or imminent injury. On respondents' motion

for summary judgment it was not enough for petitioners to allege a possible injury; they had the burden to produce specific facts to substantiate the existence of a real injury caused by respondents. The lower courts' determination that they failed to meet this burden is not at all inconsistent with the Eighth Circuit's intervention decision in *Mille Lacs*.[5]

B. Federal Courts Have Had No Difficulty in Applying Article III Standing Requirements in Reservation Disestablishment Cases.

Because the petitions do not challenge the settled principles of standing on which the district court and court of appeals relied, they present, at most, a challenge to the application of those principles to the particular facts of this case. Petitioners make no showing, however, that this fact-bound issue warrants *certiorari*. There is no indication the lower federal courts have had difficulty applying the doctrine of standing to reservation disestablishment cases.

Reservation disestablishment claims have been adjudicated on the merits in cases in which the plaintiff established a concrete injury arising from the exercise of particular governmental authority premised on the existence or disestablishment of a reservation. In addition to *Rosebud*, *Yankton Sioux*, and *New Town*, *supra*, *see*, *Hagen v. Utah*, 510 U.S. 399 (1994) (state criminal prosecution); *Solem v. Bartlett*, 465 U.S. 463 (1984) (state criminal prosecution); *DeCoteau v. District Court*, 420 U.S. 425 (1975) (state child placement proceeding and state criminal prosecution); *Mattz v. Arnett*, 412 U.S. 481 (1973) (state seizure and forfeiture

5. Judge Bowman wrote the *Mille Lacs* intervention decision and was on the Eighth Circuit panel in this case.

of fishing equipment); *Seymour v. Superintendent*, 368 U.S. 351 (1962) (state criminal prosecution); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (federal criminal prosecution); *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir.), *vacated in other respects*, 836 F.2d 1088 (8th Cir. 1987) (*en banc*) (federal criminal prosecution); *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982) (state enforcement of hunting and fishing laws); *United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980) (state enforcement of hunting and fishing laws).

In contrast, the federal courts have held reservation disestablishment claims nonjusticiable where the plaintiff did not establish an actual or imminent injury from any particular governmental action. *See, e.g., Association of Property Owners/ Residents of Port Madison v. Individual Council Members of the Suquamish Tribal Council*, 79 Fed. Appx. 126, 2003 WL 22098043 (9th Cir. 2003) (unpublished) (general "threat of enforcement of Tribal laws or exercise of Tribal jurisdiction" insufficient to establish standing); *Cass County*, 570 F.2d at 741 (claim nonjusticiable where jurisdictional question presented in the district court "abstract and hypothetical"); *Brown-Outagamie-Oneida Jurisdiction Commission v. Powless*, No. 85-C-1052 (E.D. Wis. 1990) (Bank 8th Cir. App. 55-56) (claim nonjusticiable because plaintiffs "unable to point to any actual exercise of jurisdiction over fee patented lands by the tribe").

Petitioners do not suggest these courts have incorrectly applied standing principles in reservation disestablishment cases.

The consistent application of settled principles of standing in reservation disestablishment cases does not warrant *certiorari*.

C. The Lower Courts Did Not Err in Determining Petitioners Failed to Present Specific Evidence of Injury in Response to Respondents' Summary Judgment Motion.

Even if this Court were inclined to review the application of correctly stated standing principles to particular facts, there is nothing in the record to suggest the lower courts erred in applying those principles to the facts in this case.

1. Enforcement of State and Local Laws.

The County asserts an injury to its ability to enforce its laws. However, it failed to substantiate this claim with any specific examples where County law enforcement was affected by respondents' actions. When asked to provide such details, the County responded that its allegation was "not based upon any specific date, person, activity, event or location." Resp. 8th Cir. App. 80-81. The County Sheriff testified respondents have taken no actions that impaired public safety or his agency's ability to enforce state and local laws. *Id.* 102, 105-06, 108-11, 113, 118, 121. And, the County admitted it presently enforces the law "*without* regard to the 1855 Reservation boundaries or membership in the Mille Lacs Band." County 8th Cir. Br. at 47 (emphasis in original). The lower courts correctly concluded the County did not demonstrate an actual or imminent injury to its ability to enforce its laws.[6]

6. In *Virginia v. Hicks*, 539 U.S. 113, 120-21 (2003), this Court held a state suffered injury in fact from a state court judgment holding a state law unconstitutional, and therefore had standing to challenge the state court judgment in this Court. There is no similar judgment limiting County law enforcement in this case.

2. Enforcement of Band Laws.

The Bank claims injury from the *potential* application of Band laws to it. Although most Band laws were enacted nearly 20 years ago, Resp. 8th Cir. App. 168, 170, 213-14, *no* Band law has *ever* been applied to the Bank. For example, the business-licensing program developed under Band law applies only to businesses that do business with the Band. *Id.* 32-33 (¶¶ 4-9), 124 (¶ b), 127 (¶¶ 3-4), 186, 188, 191-95. Similarly, the Band has limited enforcement of its environmental laws to its own lands and members. *Id.* 151 (¶¶ 24-25), 198-201. As the district court found, "the Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its 4000 acres." Bank App. 17a.

The Bank submitted no evidence the Band intends, after 20 years, to begin applying its laws to the Bank. The Bank (Pet. at 8) quotes a passage from a 15-year-old political speech by a former Band Chief Executive, but the speech presented a program to re-purchase lands, not to assert jurisdiction over nonmembers. The Bank cites no evidence of any *current* Band intent to expand the enforcement of Band laws to nonmembers. And, despite the Bank's claim (Pet. at 11) that "the specter of Band regulation poses significant operational concerns to the Bank," the Bank submitted no evidence that the Band's statutes have had *any* impact on Bank operations. Specifically, the Bank made no claim that either the existence of the Band's statutes or the Band's position regarding the status of the 1855 Reservation has affected in any way who the Bank does business with, where it does business, the terms of any Bank loan or other transaction, the Bank's enforcement of any delinquent loan, the Bank's future business plans, or any other matter.

3. Property Values.

The Bank claims (Pet. at 13) the Band's alleged assertion of regulatory authority has caused a decline in property values. The most basic problem with this claim was the "utter paucity of admissible evidence" to support it. Bank App. 22a. The Bank's *only* evidence of diminished values was a two-and-a-half page affidavit from an appraiser, Roger Wagner. Bank 8th Cir. App. 427-30. The district court found this affidavit did not satisfy plaintiffs' burden under Federal Rule of Civil Procedure 56(e) to adduce specific facts establishing a genuine issue for trial. Bank App. 21a.[7]

The only "fact" underlying the opinion was a published advertisement identifying a piece of property as lying "outside the disputed boundaries." *Id.* The affidavit contained no empirical evidence comparing land values inside and outside the Reservation boundaries. *Id.* 21a-22a.

> Plaintiffs' "expert" offers nothing other than conjecture to show that verbal sparring over the 1855 boundaries has caused any devaluation or decline in real estate values. Mr. Wagner presents no data or quantification as to the actual lost value caused by the dispute, but merely offers his personal belief that some effect has occurred.

Id. 22a. The district court took notice of the fact that the 1855 Reservation includes Mille Lacs Lake waterfront and

7. *See Weisgram v. Marley,* 528 U.S. 440, 454 (2000) (expert opinion "not supported by sufficient facts to validate in the eyes of the law" cannot support jury verdict); *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209, 242 (1993) (expert testimony is "useful as a guide to interpreting market facts, but is not a substitute for them").

other highly desirable vacation, business and residential property; "[t]aking into account the historically strong interest in owning this lake front property, and the absence of evidence of so much as a single sale where proximity to Indian Country affected price," the court correctly found petitioners failed to demonstrate any injury or risk of future injury. *Id.*[8]

The Bank also points (Pet. at 14) to the affidavits of its Chairman, B. P. Allen. The affidavits do not claim property values *have declined*, but state in conclusory fashion that the Band's alleged assertion of regulatory authority "*will depress* the market value" of the Bank's property interests. Bank App. 58a (emphasis added). The prospective, contingent nature of Mr. Allen's assertion is underscored by his statement that the Bank intervened in this case to prevent negative impacts "which will result *if* the former 1855 reservation is found to exist along its original boundaries," or *if* the Band has the authority to license businesses within the area of the former 1855 reservation." *Id.* 58a-59a (emphasis added). Because the Band has not sought *any* relief in this case, these unsupported allegations do not establish an actual or imminent injury.

4. Controversy.

Finally, petitioners argue that because respondents are allegedly seeking to "resurrect" the 1855 Reservation, the disagreement over the Reservation's status is, by itself,

8. The County Commissioner who served as the County spokesperson for this litigation testified that property values have increased countywide in recent years, and that values within the 1855 Reservation have followed the *same*, *increasing* trend. Resp. 8th Cir. App. 67c.

enough to establish standing. However, the "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). While a tribe's assertion of jurisdiction over nonmembers can undoubtedly have "real, practical consequence," *Hicks*, 533 U.S. at 383 (Souter, J., concurring), that does not mean a challenge to tribal jurisdiction or to the status of a reservation can be litigated in any case in which there is an abstract disagreement over tribal authority. Where, as here, there is no tribal action that has caused an actual injury to plaintiffs and no such injury is imminent, the "essential and unchanging" requirement of standing, *Lujan*, 504 U.S. at 560, has not been met.

CONCLUSION

The petitions for writs of *certiorari* should be denied.

Respectfully submitted,

MARC D. SLONIM
Counsel of Record
JOHN B. ARUM
ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM
2101 Fourth Avenue
Suite 1230
Seattle, WA 98121
(206) 448-1230

Attorneys for Respondents